

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

JOHN C. MOSS, ) Docket No. 3:10CV2055  
Plaintiffs, ) Toledo, Ohio  
v. ) December 8, 2011  
CSX TRANSPORTATION, ) JURY TRIAL EXCERPT  
Defendants. )

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TRANSCRIPT OF TESTIMONY OF DENNIS GATES, M.D.  
BEFORE THE HONORABLE JACK ZOUHARY  
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript  
produced by notereading.

1           MR. HAYDU: Your Honor, at this time we'd like to  
2 call Dr. Dennis Gates.

3                           DENNIS GATES, M.D.  
4 was herein, called as if upon examination, was first duly  
5 sworn, as hereinafter certified, and said as follows:

6                           DIRECT EXAMINATION

7 BY MR. HAYDU:

8 Q.           Will you please state your name and spell your  
9 last name for the record?

10 A.           Dennis Gates, G-A-T-E-S.

11 Q.           And what is your occupation or profession?

12 A.           I'm an orthopaedic surgeon.

13 Q.           And are you licensed to practice medicine?

14 A.           I am.

15 Q.           What state?

16 A.           Illinois.

17 Q.           Could you tell the jury what an orthopaedic  
18 surgeon is?

19 A.           An orthopaedic surgeon is a physician who is  
20 specializes in the skeletal system, bones and joints. And  
21 we deal with trauma, fractures, as well as arthritis and  
22 anything dealing with joints or bones.

23 Q.           Doctor, I'm showing you what's been marked as  
24 Exhibit Number 3. Is this a true and accurate copy of your  
25 current CV?

1 A. It is.

2 Q. Could we tell the jury a little bit about your  
3 educational background and training?

4 A. Okay.

5 Q. Where did you go to medical school?

6 A. Thank you for starting. I went to medical school  
7 at Loyola Stritch in Chicago, interned at Northwestern  
8 University. Then as a general practitioner I went into the  
9 Peace Corp for two years. Family medicine was our primary  
10 care medicine. Came back and did a year of general surgery  
11 residency at Mercy Hospital. Then went into orthopaedic  
12 surgery, a residency at Northwestern for four years,  
13 finishing up in '71. That's it.

14 Q. All right. And are you on staff at any hospitals  
15 currently?

16 A. Two, Mercy Hospital in Chicago for the past 38  
17 years and Rush Presbyterian St. Luke's University for the  
18 past 26 years.

19 Q. And do you perform surgery anymore?

20 A. I don't.

21 Q. Okay. Could you explain?

22 A. Well, actually 11 years ago I had an accident  
23 myself at Rush University where I fell down a stairwell and  
24 broke my neck so I never went back to surgery. Although I  
25 teach and really do it in my other curriculum when I work

1 overseas.

2 Q. Could you tell the jury a little bit about your  
3 involvement overseas, what you do?

4 A. Well, for all my career, and especially the past  
5 five years, we work overseas with a group called  
6 Orthopaedics Overseas. And I just got back last night at  
7 10:00 from Haiti where we did surgery mainly assisting some  
8 of the younger doctors on surgery. And last year we were  
9 there three times. And we go other places where there's a  
10 need, so we're generally there for a couple weeks.

11 Q. Did you start going to Haiti after the  
12 earthquake?

13 A. Yes.

14 Q. What kind of surgeries do you do over there in  
15 Haiti?

16 A. It's pretty basic. If you remember the  
17 newspaper, it was all amputations and crushes. And now  
18 it's revision of amputations and treating infections in  
19 bones.

20 Q. What other places do you go with your orthopaedic  
21 group?

22 A. Last June we were invited down to Guatemala.  
23 I've been there twice. And once to Ethiopia. As the  
24 requests come in, where there's a need, we go. And for  
25 years we were going to a small hospital in Brazil.

1 Q. Do you still see patients in the U.S.?

2 A. I do. I have my same office on Archer Avenue.

3 Q. How long have you had that office?

4 A. 30 years, 35 years.

5 Q. And when do you see patients and for what reason,  
6 what things --

7 A. I don't do surgery. I still see regular  
8 patients. Of course now a lot of my patients are getting  
9 old, so they come in for we call it consultation, they come  
10 in for their standard aches and pains and to see if they  
11 need surgery or how they can get away without having  
12 surgery. And yes, you're going to ask me, we see a lot of  
13 back patients, lot of back pain. It's probably the more  
14 common thing.

15 Q. That's what I was going to ask, is that the lion  
16 share of people for back problem?

17 A. Yes, that being lion share.

18 Q. Okay. Now, when you perform surgery, when's the  
19 last time you actually did a back surgery?

20 A. '85.

21 Q. Okay. And when you were practicing surgery, were  
22 you a general orthopaedist, or did you have any  
23 specialties?

24 A. I was a general orthopaedist.

25 Q. But you've also done spine surgeries?

1 A. Yes.

2 Q. Have you done a number of spine surgeries in your  
3 career?

4 A. Oh, yes.

5 Q. You said you're on staff at some hospitals, which  
6 hospitals again?

7 A. Mercy. Medium-sized hospital, south side of  
8 Chicago, and then Rush Presbyterian, which is a big  
9 university.

10 Q. And do you have admitting privileges at those  
11 hospitals?

12 A. Yes.

13 Q. Now, are you -- do you have any other involvement  
14 with other facilities other than Mercy and Rush such as  
15 Misericordia?

16 A. Thank you, yes. I'm the orthopaedic consultant  
17 for Misericordia, which is a home for disabled children  
18 which you all probably saw in the news this past week  
19 because Sister Rosemary had this big fight with the mayor  
20 about paying for water. I don't know if you saw that.

21 Q. All right. And are you a member of any  
22 fellowships on any other type of groups?

23 A. Oh, yeah. We, you know, like everybody, every  
24 physician now you hear a whole list of things, but the  
25 primary ones would be the American Academy of Orthopaedic

1 Surgery and our group called World Orthopaedic Concern and  
2 American Medical Association and all those things.

3 Q. Board certified?

4 A. Yes, board certified back in '76 -- 5.

5 Q. What's the significance of board certification?

6 A. You take the exam. It's a written examination,  
7 an oral examination you take that for at least two years of  
8 practice, and it -- it certifies that you have the  
9 knowledge to do it.

10 Q. Are some orthopaedic surgeons not board  
11 certified?

12 A. Today hardly any. I mean, some of the old guys,  
13 but no.

14 Q. Now, Doctor, in addition to treating patients, do  
15 you also perform work such as here today where you don't  
16 treat a patient but you either look at records or see a  
17 patient or both and formulate opinions?

18 A. I do.

19 Q. Okay. And about what part of your business is  
20 devoted to that?

21 A. I do now. We have about 30 to 40 percent is  
22 devoted to legal reviews.

23 Q. Okay. And as far as that goes, have you been  
24 retained by my firm on a number of occasions to review  
25 the -- their clients?

1 A. I have.

2 Q. And are you -- who else retains you to make  
3 reviews and opinions on medical issues?

4 A. Just a few others, the majority is you guys, as  
5 you know. And you don't really want anybody else --

6 Q. Did I ask you to review the records of a John  
7 Moss in this matter?

8 A. You did.

9 Q. Did you author a report which contains your  
10 opinions and conclusions along with the list of records  
11 you've reviewed and the kind of a summary of the records?

12 A. I did.

13 Q. Showing you Exhibit Number 4, is that a current  
14 and accurate copy of your report and records?

15 A. It is.

16 Q. Okay.

17 A. You know, as it was slightly modified in my  
18 deposition the four little things at the end.

19 Q. Since your report was generated, you have  
20 reviewed a few additional items --

21 A. Yes.

22 Q. -- that weren't available at the time of your  
23 report?

24 A. Yes.

25 Q. Such as?



1 A. I think there were four of them. One was a  
2 patient's deposition. The other one was Dr. Hannallah's  
3 deposition.

4 Q. Hannallah?

5 A. Hannallah, thank you. Hannallah. The defense's  
6 expert's deposition -- or report. And the last thing was a  
7 visit in '06 which somehow was texting me while I was in  
8 Haiti so I didn't see it actually, but I just got the text.

9 Q. All right. Any of those additions change your  
10 opinions or anything?

11 A. No.

12 Q. Okay. Let's -- let's -- in addition to what you  
13 have mentioned, the material that you reviewed before,  
14 since your report, what did you review looking at your  
15 catalog of records, what did you review in preparation of  
16 your report?

17 A. You mean briefly read these?

18 Q. Yes, could you read these, please?

19 A. Medical records from Mercy Hospital of Willard,  
20 Dr. Brandt, Dr. Hannallah, the rehabilitation, Novacare  
21 Rehabilitation, Taylor Station Surgical Center, Apex  
22 Counseling, Mercy Hospital of Tiffin, St. Charles Mercy  
23 Hospital, Grant Medical Center, The Railroad Retirement  
24 Board report.

25 Q. Okay. Did you also look -- I'm sorry, go ahead.

1 A. The other four things I think we just mentioned.

2 Q. Did you also review the actual MRI films of  
3 Mr. Moss?

4 A. I did.

5 Q. Okay. Now, when you look at the records, do you  
6 catalog them and summarize them?

7 A. Yes.

8 Q. And do you have any assistance in, you know,  
9 pulling the records together?

10 A. Yes.

11 Q. How is that done?

12 A. I have my secretary of 38 years who puts these --  
13 who truly believes she's my mother but she's not. Anyway,  
14 she organizes them, and she creates the outline for this  
15 chronology, and she fills in all the straight-forward  
16 reports like x-ray reports and emergency room visits, and I  
17 review the records and I dictate what she adds to it, so it  
18 sort of puts it together.

19 Q. All right. Did you also review, I know you  
20 talked about a 2006 emergency room visit, did you also  
21 review pre-accident medical records on Mr. Moss?

22 A. Yes. They were actually included in that report.

23 Q. Okay. Now, did you review the accident records  
24 of Mr. Moss since this injury, since this incident?

25 A. Did I review the accident --

1 Q. I'm sorry, I misspoke. Did you review the  
2 medical records of Mr. Moss, of Dr. Hannallah and  
3 Dr. Brandt since this injury?

4 A. Yes.

5 Q. What was your understanding of the sequence of  
6 medical treatment Mr. -- well, strike that.

7 After a review of all the records, did you come  
8 to a diagnosis of Mr. Moss' condition?

9 A. I did.

10 Q. Okay. Did you examine Mr. Moss?

11 A. I did not.

12 Q. Well, wouldn't you think it would be prudent to  
13 examine a person whose medical condition you're opining on?

14 A. Yeah, usually I do. But if they're from out of  
15 town and if -- we'll have them come in town if necessary.  
16 But this one was simply so straight forward and the records  
17 were so clear, except for Dr. Brandt's which we couldn't  
18 read.

19 Q. Couldn't read his handwriting?

20 A. All the other reports and records were sort of  
21 straight forward so I did not request that we see him.

22 Q. All right. What was your diagnosis of Mr. Moss  
23 after review of all the records?

24 A. We had basically five diagnosis, and just to  
25 clarify again on my report there are four, but at the

1 deposition we separated them out to five.

2           Number one was chronic low back pain secondary to  
3 the aggravation of the degenerative disc disease.

4           Number two is right radicular symptoms just like  
5 sciatica, secondary to the herniated disc at L4-L5.

6           Number three was cervical strain, neck strain.

7 Number four was the strain -- sorry. Cervical strain, neck  
8 strain resolved.

9           Number four was the strain or conclusion of the  
10 left shoulder resolved.

11           And number five was post traumatic stress  
12 disorder controlled.

13 Q.           Now, as an orthopaedic surgeon, strike that.

14           In your review of records to review the post  
15 traumatic stress disorder, did you review the records of  
16 a -- we call it Dr. -- Mr. Bastin of Apex Counseling?

17 A.           Yes.

18 Q.           And as an orthopaedic surgeon, are you involved  
19 in your treatment of patients who sometimes present  
20 themselves with post traumatic stress disorder or other  
21 psychological malates from their accident?

22 A.           I do. I won't treat them, but I've dealt with  
23 them a lot, Vietnam we saw hundreds. And then there's the  
24 trauma -- I mean, you're a trauma surgeon so you see a lot,  
25 but then I refer them.

1 Q. So that's something that you do, recognize and  
2 have to deal with in your practice as an orthopaedic  
3 surgeon?

4 A. Oh, yes.

5 Q. Now, Doctor, were those diagnoses, in your  
6 opinion, caused in whole or in part by this railroad  
7 accident?

8 A. I thought so, yes.

9 Q. Okay. Now, lets talk about the MRI that you  
10 reviewed.

11 A. Okay.

12 Q. What did it show?

13 A. It showed two things, mainly it showed a  
14 herniated disc at the L4-L5 level.

15 Q. Doctor, I'm going to show you a model of two  
16 vertebrae, and if you could ask, or if you could explain to  
17 the jury what you're talking about?

18 A. Could I start with the big one first?

19 Q. Sure.

20 A. Can you guys see this all right? This is just  
21 the shortcut over here, and you've got the lumbar  
22 vertebrae, neck and the chest. And so we're dealing just  
23 down low with the, we number them, this is one, two, three,  
24 four, and then we start again, S with the sacrum. That's  
25 why the word dealing mainly with this one over here, the

1 fourth and the fifth. Okay.

2 I'm sorry, what do you want me to show them?

3 Q. You mentioned a herniated disc. Can you explain  
4 what a disc is, how it works and what a herniation is?

5 A. Basically you see a model, and a disc is like a  
6 gasket in an engine. It's a spacer between the two bones.  
7 And this model is really very, very good, because you can,  
8 if you feel this, you can feel this hard bone, and this is  
9 a firm rubbery thing. It's sort of like the heavy vinyl on  
10 the seat that you're sitting on. And a herniated disc is  
11 when the outer rim of this thing, we have a name called for  
12 it called the annulus. This annular breaks, ruptures, and  
13 the disc material that was inside then herniates out.

14 Q. Are there different degrees of problems with the  
15 disc?

16 A. Sure.

17 Q. There's a normal disc?

18 A. There's a normal disc.

19 Q. What's the next step up?

20 A. Different words get -- but basically you have a  
21 bulging disc where it's just pushing out a little bit.  
22 Then you can have a -- then we've got to go to herniation.  
23 There's another word you're looking for.

24 Q. Okay. And then after herniation, what's an  
25 extruded disc?

1 A. I'm sorry, thank you. So it bulges a little bit,  
2 or bulges a lot, and then it herniates and sticks out and  
3 presses against a nerve, and it becomes -- when it becomes  
4 extruded, when this thing that's sticking out here breaks  
5 off and moves down into the canal, it's not floating, but  
6 it moves down and it's stuck in the canal. And the canal  
7 is this space over here. If you have loose fragment or  
8 extruded, it's stuck over here and it causes pain because  
9 it's pressing against the nerves. It's really very simple  
10 when you see it like that.

11 Q. Does that also cause what we've heard today  
12 radicular symptoms?

13 A. Yes.

14 Q. Now, is a disc that's actually extruded, is that  
15 something that's a long-standing finding that someone would  
16 walk around with an extruded disc for years?

17 A. Not really likely. I mean, it hurts. Extruded  
18 disc comes out, there you can see where it's pressing  
19 against the nerve. I mean, that hurts.

20 Q. Okay. Let's talk about the MRI that you  
21 reviewed, what did it show?

22 A. That was the main thing, it showed the extruded,  
23 herniated disc. Hold on one second.

24 And then the second level, the fifth and the  
25 first level it showed a bulging disc, okay. And thirdly,

1 it showed some mild, or one report said some moderate  
2 arthritis. We also use the term degenerated disc.

3 Q. Okay. Now, let me ask you this, does a  
4 herniation of a disc degenerate the disc? How would you  
5 define degeneration?

6 A. Obviously it's sort of like a tire on a car. If  
7 you scrape off a piece of the rubber, tire's still there  
8 but it's not as good so we call that degeneration. Yes.

9 Q. Now, in your review of the records, did Mr. Moss,  
10 had he had treatments prior to this accident for  
11 degenerative problems with his discs?

12 A. No, not really.

13 Q. He had been to the doctor a few times?

14 A. Yeah, there were -- there were two records in the  
15 past ten years where he had some back pain, and both were  
16 after doing something, really a back strain. But he never  
17 really had x-rays, he never had an MRI, never had anything.

18 Q. Okay. Now, if you look at your records, you  
19 review the 6-2-08 x-rays of his lumbar spine taken about  
20 two months after the accident?

21 A. Yes.

22 Q. Do you see where you've looked at those?

23 A. I do -- I did.

24 Q. What do they indicate to you?

25 A. It basically showed some -- the actual report



1 said decreased disc space in the L5-S1 level.

2 Q. Can we show the jury what we're talking about and  
3 what that means?

4 A. Okay. So you see the disc is here, but on the  
5 x-ray when you look at an x-ray you don't see the disc at  
6 all. All you see is the bone, okay, and we have a space  
7 between there. So the disc itself down at this level was  
8 narrowed. That's all.

9 Q. Okay.

10 A. And then -- and then on the edges when it starts  
11 narrowing down you've got little creases in the edges of  
12 the bone.

13 Q. And is that necessarily a finding that would  
14 always cause symptoms?

15 A. Is that a finding that would cause symptoms, no  
16 no. You can -- you see that on, I mean, if you took x-rays  
17 of everybody here, probably 30 percent would have some of  
18 that after they --

19 Q. So can people have that identical x-ray and not  
20 have any problems with their back?

21 A. Yes.

22 Q. Now, if you look at the July 3rd, 2008 review of  
23 the lumbar MRI, did you also -- did you review not only the  
24 actual films themselves but the radiologist report?

25 A. Yes.

1 Q. Okay. And what did the radiologist indicate was  
2 at issue with the MRI?

3 A. Well, his report is actually written down right  
4 there in my chronology. He says a right sided extruded or  
5 free disc fragment, which we just talked about, and it's  
6 already moved down to the next level. It's extending from  
7 the L4-5, which we pointed out on the right, causing mild  
8 compression on the far right side of the thecal sac. It's  
9 just the spinal cord or the sac that contains the spinal  
10 cord. And marked effacement, that's pressing in, pushing  
11 in, of the right lateral recess. That's just the space  
12 where the nerve root goes out down the leg.

13 And then number two it says moderate degenerative  
14 disc disease at the lower level, L5-1 with moderate bulging  
15 causing mild compression of the thecal sac.

16 Q. Okay. Now, did you review Dr. Hannallah's  
17 treatment of Mr. Moss?

18 A. I did.

19 Q. Okay. After the lumbar MRI, if you look on page  
20 4 of your -- or page 2 of your report, of your  
21 chronological summary, what did Dr. Hannallah do?

22 A. Well, on July 9th of '08, that was after the MRI,  
23 and he sent him to physical therapy. He discussed possible  
24 ESI's, that's the epidural injections of steroid, which he  
25 does have eventually. And stenosis, he discussed surgery,

1 but decided he was not a candidate at that time.

2 Q. All right. Now, moving forward, did Mr. Moss  
3 attempt to return to work at some point?

4 A. He did.

5 Q. How did that go?

6 A. Well, he went back to work and he lasted, I  
7 think, a month, and the changes got bad, so he went back to  
8 Dr. Hannallah.

9 Q. Is that something you've seen in the practice of  
10 orthopaedic surgery where you release a patient to try to  
11 go back to work and see if he can do it?

12 A. Oh, sure. It's usually the good patients want to  
13 go back and try.

14 Q. Sometimes it works, sometimes it doesn't?

15 A. Correct. Yes, it's a trial.

16 Q. Is that fairly common in the practice of  
17 orthopaedic surgery to attempt to let somebody go back to  
18 work if they want to?

19 A. Yes. Yes.

20 Q. Now, moving ahead to November 18th on page 3 of  
21 your report, what was done at that point?

22 A. Well, Dr. Hannallah saw him a number of times and  
23 then he sent him to get these two injections of his spine,  
24 which were done by someone else at the surgery center.

25 Q. All right. Could you explain to the jury what a

1 lumbar epidural steroid injection is intended to do, how it  
2 works and where it's done?

3 A. Well, first I'll tell you it's really a magical  
4 thing and it works. It helps so often. But basically  
5 you've seen the disc over here in and the space, so the  
6 problem is the disc is out and it's pressing against the  
7 nerve, and it's almost like when you have something in your  
8 shoe. If you have a little stone in your shoe, it starts  
9 rubbing and rubbing and rubbing. Well, that portion of the  
10 skin becomes inflamed. So everything around here becomes  
11 inflamed.

12 So we take a needle, a long needle and comes in  
13 from wherever they're going to do it from, the side, and  
14 you inject steroid, cortisone. You've all heard of  
15 cortisone cream. It's really the same darn thing. And if  
16 you do it right, you need a big x-ray machine to get the  
17 needle right there, inject the cortisone, and then that  
18 will decrease the swelling and the irritation over the next  
19 four or five days, and hopefully it will last for a long  
20 time.

21 Q. Does it work on some people and not work on  
22 others?

23 A. It does. And many times it gives you relief for  
24 a year, two years, three years.

25 Q. Do some people get temporary relief of a month or

1 so?

2 A. Yes.

3 Q. How many epidurals did Mr. Moss have?

4 A. He got two of them, and they were done a month  
5 apart.

6 Q. Now, did you review Dr. Hannallah's records with  
7 respect to his work restrictions on Mr. Moss?

8 A. I did.

9 Q. Showing you page --

10 A. You're talking about those three forms?

11 Q. If you can look on the screen in front of you, it  
12 might be quicker. You have a little TV. It's a high-tech  
13 courtroom.

14 A. Cool.

15 Q. Showing you what's been marked as page 16 of  
16 Exhibit Number 1. Dr. Hannallah's restrictions dated  
17 2-3-09, what were those?

18 A. He said that he could go back to work as of  
19 January 31st with avoiding heavy lifting more than  
20 20 pounds, I think it says -- more than 20 pounds and no  
21 twisting.

22 Q. Okay. And also in the records that you reviewed,  
23 did you see his January 28th letter to Mr. Moss, page 14 of  
24 Exhibit 1, where he indicates, I would recommend that you  
25 try to avoid any type of heavy lifting, lifting more than

1 20 pounds and/or twisting, as I think these can aggravate  
2 your back?

3 A. Yes.

4 Q. Do you agree with those restrictions?

5 A. I do.

6 Q. Could you tell the jury why?

7 A. Well, they're sort of straight forward. You have  
8 a herniated disc -- yes, you've got some degenerative disc  
9 disease which he had before, okay. But then this disc  
10 herniates out so now you're missing a portion of the disc  
11 so you've got further degeneration. And there's still  
12 material in there. So the idea is to prevent something  
13 else from happening as well as to decrease the symptoms.

14 Q. Is a -- is a disc that is herniated that has  
15 herniated already more susceptible to injury than a disc  
16 that has not had a herniation?

17 A. Yes.

18 Q. Could you explain?

19 A. I think I sort of just did. You've got this  
20 round disc and a portion bulges out so this whole thing is  
21 injured. It's already been degenerated. But now we don't  
22 have enough of the material inside. And yes, someone can  
23 say, well, you're losing that material normally through  
24 aging. And that's true, but we've got a big disc out so  
25 there's more. But the other thing, too, is you know when

1 you have -- when you have this disc and you got a good blow  
2 like being knocked with this railroad thing that causes a  
3 force, it's like a -- if you're on a motorcycle and you  
4 suddenly hit a big thing like this, you will feel that in  
5 your spine and that does a little damage.

6 Q. Now, as a treating physician, do you have a  
7 different relationship to patients than just reviewing  
8 records or doing a forensic legal medical exam?

9 A. Well, sure. Do I have a different relationship?  
10 Sure. I don't have a formal relationship with the patient.

11 Q. As a doctor, when you're treating someone, do you  
12 have a medical duty to prescribe -- or standard of care for  
13 a doctor to prescribe restrictions that are not going to be  
14 harmful to the patient?

15 A. Well, sure. But frankly, that way it's not  
16 really -- we have an obligation to -- to treat the patient,  
17 and the treatment involves telling him what not to do. If  
18 you have a heart attack I'm going to tell you to stop  
19 eating fatty foods. That's part of the treatment.

20 Q. If you have a herniated disc and disk bulging  
21 from an accident on the railroad, what do you tell the  
22 people?

23 A. I'm going to tell them don't do anything that  
24 causes a pounding, you don't want any vibrations, you don't  
25 want a blow. You don't want to carry something heavy

1 because the thing --

2 Q. We talked about -- let's look at your page 2 of  
3 your opinion report as far as the return to work capability  
4 of Mr. Moss. What's your opinion with respect to returning  
5 to any job requiring any heavy lifting or climbing?

6 A. It's just like his treating surgeon said, it's  
7 the same thing. He really should not go back to any job  
8 requiring heavy weights, climbing, twisting or any kind of  
9 vibrations.

10 Q. Does the fact that an individual attempts to go  
11 back to work, does that help you, as a physician, see  
12 whether or not that's a suitable job for him if he has  
13 problems doing the job?

14 A. Well, sure.

15 Q. Now, we talked about vibrations. What -- what  
16 does vibrations play with respect to your concerns with  
17 Mr. Moss?

18 A. Further degeneration of the disc and causes  
19 aggravation of the symptoms.

20 Q. Do you think Mr. Moss would be eligible to return  
21 to his job as a locomotive engineer?

22 A. I don't think so.

23 Q. Do your opinions, based on a reasonable degree of  
24 medical and surgical certainty, were the symptoms Mr. Moss  
25 experienced and described to his doctors caused in whole or



1 in part by the railroad accident of April 7th, 2008?

2 A. Yes. I said yes, they are.

3 Q. To a reasonable degree of medical certainty --  
4 strike that.

5 Can trauma -- we've talked about Mr. Moss had  
6 some degenerative changes in his spine before this  
7 accident. Can trauma cause asymptomatic degenerative  
8 changes or intermittently symptomatic degenerative changes  
9 in the spine to become worse?

10 A. Well, sure.

11 Q. How's that work? How does that work?

12 A. Sort of straight forward. But we -- number one,  
13 we don't routinely get x-rays and MRIs of patients, so you  
14 don't know a lot. But people, when we see x-rays, we see,  
15 hey, they are symptoms, you get an x-ray of a back for  
16 something else, abdominal problem, uterine tumor, and you  
17 see they've got degenerative disc disease. Sometimes  
18 they're moderate and have no symptoms. Then something  
19 happens, a fall, a fall down the stairs, a man bending over  
20 shaving puts a tremendous strain on his spine, riding on a  
21 old Harley with no shock absorbers will do it, falling on  
22 ice is the common cause for an elderly person to suddenly  
23 get symptoms from a degenerative disc. Did I answer that?

24 Q. I think so. Do you believe Mr. Moss' condition  
25 is permanent at this point?

1 A. Oh, sure, absolutely.

2 Q. Now, I'd like to just to run through outside of  
3 the disc area. You reviewed the counseling records from  
4 Dr. Bastin or Mr. Bastin?

5 A. I did.

6 Q. And in general, looking at the 5-20-08 report  
7 that you indicated, what was he experiencing at this point?

8 A. Hold on one second, 5-20-08.

9 Q. I think it's page one of your chronological  
10 summary.

11 A. Right. I've got it.

12 MR. CARNES: Your Honor, I'm going to object. I  
13 mean, I think we're getting outside the area of his  
14 expertise as an orthopaedic surgeon.

15 MR. HAYDU: May I respond?

16 THE COURT: You may. Why don't we do it up here  
17 at side bar.

18 (A side bar conference was had off the  
19 record.)

20 THE COURT: Why don't we rephrase or restart,  
21 please.

22 BY MR. HAYDU:

23 Q. Doctor, looking at the May 20th, '08 counseling  
24 record of Mr. Bastin, the counselor, what was Mr. Moss  
25 discussing with the counselor at that point?

1 A. He was discussing -- well, as Dr. Bastin said,  
2 his post traumatic stress disorder or the fact that he had  
3 anxiety flashbacks of an accident, fear, uneasiness and so  
4 forth. All that occurred with his head-on collision.

5 Q. Looking at page 2 of your chronological summary,  
6 the 5-20-08 notes, what was Mr. Bastin discussing with  
7 Mr. Moss at that point?

8 A. Basically the same thing. He continued with the  
9 same physical complaints, complaints, mixed emotions about  
10 work, but he wanted to get back to work and continue  
11 another five years.

12 Q. Okay. And on the October 25th, '08 note from  
13 Dr. -- or from Mr. Bastin, what were they discussing, and  
14 what was Mr. Bastin looking at with Mr. Moss down at the  
15 bottom of page 2?

16 A. Yeah, I've got it over there. Basically he said  
17 the symptoms of the back were due to occupational  
18 stressors, unrational (sic) fear of injury.

19 Q. I'm sorry, could I interrupt you. What do you  
20 have down there on your first sentence?

21 A. I've got unrational (sic) fear.

22 Q. You indicate the symptoms back due to  
23 occupational stressors?

24 A. Right.

25 Q. Please continue.

1 A. So the symptoms are returned due to occupational  
2 stresses means he's got back pain again because of what he  
3 was doing at work. Took me a while to figure that sentence  
4 out by the way.

5 Q. Please continue.

6 A. Then the unrational (sic) Or irrational fear of  
7 injury, which is sort of the definition of traumatic stress  
8 disorder, is not purely rational.

9 Q. What did Mr. Bastin think this was giving rise  
10 to?

11 A. Stress, anxiety and depression.

12 MR. HAYDU: I have no further questions. Thank  
13 you.

14 BY MR. HAYDU:

15 Q. Just so we're clear on the record, you're not  
16 making a diagnosis yourself of post traumatic stress  
17 disorder, are you, Doctor?

18 A. No.

19 Q. Thank you.

20 THE COURT: Cross examine?

21 MR. CARNES: Thank you.

22 CROSS EXAMINATION

23 BY MR. CARNES:

24 Q. Good morning, Dr. Gates.

25 A. Good morning.

1 Q. My name's Jamie Carnes. I represent CSX. We've  
2 never met before, but we've spoken a few times on the  
3 phone.

4 A. Yes.

5 Q. And just so I'm clear, you are not -- you're an  
6 orthopaedic surgeon?

7 A. Yes.

8 Q. You are not a current -- you don't currently  
9 perform surgeries?

10 A. Right.

11 Q. You haven't performed a back surgery since 1985?

12 A. Right.

13 Q. You haven't performed any kind of surgery in over  
14 a decade?

15 A. Well, not here in the U.S. We do the basic stuff  
16 overseas.

17 Q. Yeah, and I'm always confused on this. You're --  
18 you're not able to perform surgery in the United States but  
19 you can perform them overseas?

20 A. Essentially, yes.

21 Q. Okay. So if I wanted to have you perform  
22 surgery, we could do it in Brazil or Haiti, but we could  
23 not do it within the confines of the United States?

24 A. You wouldn't want me to do it in Haiti, but  
25 essentially, yes.

1 Q. Okay. And your current practice is divided into  
2 two parts, essentially seeing patients and giving expert  
3 testimony in cases like this?

4 A. And doing these overseas things and the  
5 organization from that. And I'm sorry --

6 Q. Go on.

7 A. My fourth thing is I do workshops unrelated to --  
8 health workshops unrelated to orthopedics.

9 Q. I talked to you about a year ago and you told me  
10 it was 50/50 between seeing patients and working as an  
11 expert for lawyers.

12 A. Okay.

13 Q. And you testified a couple weeks ago, or I'm  
14 sorry, a couple months ago, that you -- about 40 percent of  
15 your income comes from testifying in lawsuits.

16 A. Yes.

17 Q. And of the lawsuits you testify in, fair to say  
18 you always testify on behalf of the plaintiff?

19 A. Yeah, nowadays it's all plaintiff. Defense  
20 doesn't want me anymore.

21 Q. And the overwhelming majority of cases in which  
22 you testify all come from Mr. Haydu's law firm?

23 A. Yes, well, I said -- 50 percent come from --

24 Q. It's actually more than 70 percent, isn't it?  
25 You gave a case list in this case in cases which you've

1 testified over the last four years, correct?

2 A. Yes.

3 Q. And I counted up 72 cases in which you've  
4 testified in the last four years. And of those 72, 50 of  
5 them came from --

6 A. Oh, yes.

7 Q. Something from the Hoey Farina law firm?

8 A. Yes, I was referring to the total cases I  
9 reviewed. But -- yes, for testifying most -- the majority  
10 are from Haydu.

11 Q. Yes. So about 40 percent of your income comes  
12 from testifying and about 75 percent of that income comes  
13 from Mr. Haydu's law firm?

14 A. Yeah.

15 Q. And in each one --

16 A. Strictly speaking no, because the other cases I  
17 do, so many of them never come to testify. I decline them.  
18 I still get paid for reviewing them, but they're not on the  
19 report.

20 Q. The cases which you testified --

21 A. Yes.

22 Q. -- 77 percent of your income comes from  
23 Mr. Haydu's law firm?

24 A. Yes.

25 Q. In all -- that includes this case so it would

1 actually be 51 cases out of 73?

2 A. Okay. Yes.

3 Q. And in all those cases, you always find that the  
4 plaintiff -- that Mr. Haydu's client has an injury caused  
5 by whoever they're suing, right?

6 A. Well, yeah, that's the purpose of the lawsuit.

7 Q. Right.

8 A. And the ones that I decline, you know, they don't  
9 pursue.

10 Q. And your job is to give an opinion that whoever  
11 the defendant is in the lawsuit has caused the plaintiff's  
12 injury?

13 A. Yes, strictly speaking, yes.

14 Q. Yeah. And this is --

15 A. No, no, no. My job is to review the case and see  
16 if I agree with this or not and then to explain it.

17 Q. And in every case you've testified, you found  
18 that Mr. Haydu's -- or Mr. Haydu's law firm's client has an  
19 injury caused by whoever they're suing?

20 A. Sure. Yes.

21 Q. And this isn't the first time you've testified  
22 against a railroad?

23 A. No.

24 Q. The majority of your lawsuits or the cases in  
25 which you testify are against railroads?



1 A. Yes.

2 Q. And this isn't the first time you've testified  
3 against CSX, correct?

4 A. Correct.

5 Q. In fact, this is the third time at least you've  
6 given -- you've given trial testimony against CSX in the  
7 past month or two?

8 A. Yes.

9 Q. And today isn't even the first time you've  
10 testified against CSX on behalf of Mr. Haydu's law firm  
11 this week, is it? You gave --

12 A. It is --

13 Q. You gave trial testimony by video in a case  
14 called Thompson versus CSX that went to trial this week,  
15 correct?

16 A. We actually did the video a few weeks ago before  
17 I went to Haiti.

18 Q. The trial was this week, and then they played  
19 that video -- the trial was this week where they replayed  
20 your testimony, correct?

21 A. Okay. I didn't realize that.

22 Q. And the other part, you mentioned some workshops.  
23 The other part of your --

24 A. Life.

25 Q. -- your practice, you've described it as the

1 practice of integrated medicine?

2 A. Yes.

3 Q. And you've described yourself as advising on  
4 optimum health advice?

5 A. Yes.

6 Q. As it applies to your orthopaedic condition?

7 A. Yes.

8 Q. And what that means is, I think you told me  
9 before, that's the blending of standard western medicine  
10 with alternative medicine?

11 A. Yes.

12 Q. And your current practice involves doing things  
13 like giving diet and health advice?

14 A. Yes.

15 Q. And acupuncture?

16 A. Yes.

17 Q. Hypnosis?

18 A. Yes.

19 Q. And these aren't the standard things an  
20 orthopaedic surgeon does, fair to say?

21 A. That's absolutely true.

22 Q. And you perform hypnosis on patients?

23 A. Well, no, not formally. I've done hypnosis  
24 through my hobby. I've done hypnosis for years, mainly of  
25 children.

1 Q. You've testified before that you do hypnosis on  
2 patients?

3 A. Yes.

4 Q. And hypnosis would not be something you've  
5 learned in medical school?

6 A. No way. No.

7 Q. Where did you learn hypnosis?

8 A. Out in California at a place called the Esalen  
9 Institute.

10 Q. What is the Esalen Institute?

11 A. It's an alternative learning institution in  
12 California, and I teach out there once a year.

13 Q. Is it also clothing optional?

14 A. Pardon?

15 Q. Is it also clothing optional?

16 A. Absolutely not. They have hot tubs which are  
17 clothing optional.

18 Q. Mr. Moss, who you're giving opinions regarding,  
19 you have never met him before today, correct?

20 A. Met Mr. Moss?

21 Q. Yes.

22 A. No, met him today.

23 Q. And never spoke with him on the phone?

24 A. No.

25 Q. Never physically examined him?

1 A. No.

2 Q. Never talked to him about his history?

3 A. No.

4 Q. What you did was a record's review?

5 A. Correct.

6 Q. And fair to say -- well, let me ask you about  
7 your record's review. After reviewing those records, you  
8 came to a couple opinions which we went through. And first  
9 I want to ask you about the herniated disc. You mentioned  
10 he had some extruded -- or a herniated disc with extruded  
11 disc material, correct?

12 A. Yes.

13 Q. And the symptoms you would expect from the  
14 herniated disc like that would be, in his case, right-sided  
15 radicular pain?

16 A. Say that again.

17 Q. When someone has a herniated disc, the symptoms  
18 you would expect would be right sided -- he had a herniated  
19 disc on his right side, correct?

20 A. Correct.

21 Q. So what you would expect from that kind of  
22 condition is right-sided radicular pain, correct?

23 A. Yes.

24 Q. If someone has right-sided radicular pain, that's  
25 a sign they would have a herniated disc?

1 A. Yes.

2 Q. And you're assuming in this case that Mr. Moss --  
3 well, you have an opinion in this case Mr. Moss' herniated  
4 disc was caused by the accident in April of 2008, correct?

5 A. Yes.

6 Q. And the reason you have that opinion is because  
7 you believe that there was no radicular symptoms prior to  
8 April of 2008, correct?

9 A. Yes.

10 Q. And in fact, sir, you have not reviewed any  
11 records which indicate radicular pain prior to 2008?

12 A. Correct.

13 Q. I'm going to show you what's been marked as  
14 Exhibit 19, and this is -- this is probably the record you  
15 said you got texted to you, but this is the 9-30-2006  
16 emergency report record. Can you see that okay?

17 A. I do.

18 Q. And I'll zoom in a little bit. And that record  
19 notes that the patient was having persistent pain in the  
20 low back radiating to the right buttock associated with  
21 parathesis in the right foot. Do you see that?

22 A. I see it.

23 Q. And that would be a symptom of a herniated disc,  
24 correct?

25 A. Yes, could be.

1 Q. Yes. And I know you mentioned Dr. Brandt's  
2 records were illegible.

3 A. Yes.

4 Q. And in fact, nobody's been able to read  
5 Dr. Brandt's records. Have you read -- have you -- we  
6 heard Dr. Brandt testify this morning. Have you read his  
7 deposition testimony?

8 A. I did not.

9 Q. Were you aware of the fact that in 2004 Mr. Moss  
10 had treated with Dr. Brandt for pain that radiates down  
11 into his right leg?

12 A. Yes.

13 Q. You were aware of that?

14 A. Yeah. You're going to ask me why. No, I did not  
15 have that one.

16 Q. No. And you did not have the fact that in 2006  
17 he had treated with Dr. Brandt for right-sided radicular  
18 pain either, correct, Doctor?

19 A. Correct. Correct. Got that one last week.

20 Q. And so what we know now is that there are several  
21 records which indicate Mr. Moss was having right-sided  
22 radicular pain two to four years prior to the accident,  
23 correct?

24 A. Yes.

25 Q. And that would be a sign he had a herniated disc

1 two to four years prior to the accident, correct?

2 A. Well, one thing in causing a herniated disc, yes.

3 Q. And so in fact, it would be fair to assume since  
4 he's having right-sided radicular pain two to four days  
5 prior to the accident, that he likely had something  
6 impinging on his nerve two to four years prior to the  
7 accident such as a herniated disc, correct?

8 A. It could be at the time, but then it went away.

9 Q. The herniated disc could have gone away?

10 A. Oh, sure.

11 Q. Or it could be the same herniated disc?

12 A. I don't think so.

13 Q. Why is that?

14 A. You can't really work with a herniated disc. I  
15 mean, a herniated disc is pain. So he goes to the  
16 emergency room, and that's what people do.

17 Q. Well, I asked you --

18 A. And we used to operate on these right away, now  
19 we know that if you leave them alone they regress until the  
20 disc shoots out all the way and extrudes.

21 Q. Well, I asked you that, Doctor, in your  
22 deposition. Do you recall giving a deposition?

23 A. I do. I just finished reading it again.

24 Q. And I asked you if someone who has a herniated  
25 disc that's symptomatic would be able to go back to work,

1 and you said you thought they could?

2 A. Oh, I think it's the same thing that Mr. Haydu  
3 was saying, that, yeah.

4 Q. Someone can work with a herniated disc, correct?

5 A. This is a matter of semantics. You can't work  
6 with a herniated disc unless it resolves. It's just too  
7 painful; although if you really have to work on a job, you  
8 can really overcome anything, I guess.

9 Q. Let me just show you your testimony, sir.

10 A. Yes. Oh, I remember it.

11 Q. I asked you, is it your opinion in all cases  
12 someone with a herniated disc that's symptomatic or  
13 degenerative disc disease that's symptomatic would be  
14 disabled from working as a locomotive engineer. Your  
15 answer was, no, I think many can go back.

16 Did I read that correctly?

17 A. Yeah. Hold on one second.

18 MR. HAYDU: Your Honor?

19 THE COURT: Yeah.

20 MR. HAYDU: Could I approach, please?

21 THE COURT: You may.

22 THE WITNESS: What page was that?

23 MR. CARNES: Fifty.

24 (A side bar conference was had off the  
25 record.)



1 BY MR. CARNES:

2 Q. My question was did I read that testimony  
3 correctly? Did you have a chance to look at it?

4 A. I did.

5 Q. Did I read it correctly?

6 A. You did.

7 Q. And just so we're clear, your reasoning for --  
8 your reason for opining -- what you testified before is  
9 your reason for opining his herniated disc was caused by  
10 the accident was the lack of radicular symptoms prior to  
11 April of 2008, correct?

12 A. Yeah, that was -- that was one reason, yes. That  
13 was the main reason.

14 Q. That was the main reason, and that has turned out  
15 to be incorrect based on records we've seen, since that  
16 date he has had radicular symptoms prior to April of 2008?

17 A. He has, yes.

18 Q. Now, the other thing he has is degenerative disc  
19 disease?

20 A. Yes.

21 Q. And everybody has that to some extent, correct,  
22 or they will have it?

23 A. Little exaggeration, but, yes.

24 Q. We're all going to get it at some point in some  
25 form or another?

1 A. Okay. You can say that.

2 Q. As we age the moisture content in your discs  
3 starts to reduce, right?

4 A. Yes.

5 Q. And certainly what we've seen on the degenerative  
6 disc disease, you've seen on films and MRIs wouldn't be  
7 unusual for a man Mr. Moss' age, correct?

8 A. Correct, he does have it.

9 Q. And you have no doubt that the degenerative disc  
10 disease pre-existed the accident date?

11 A. Correct.

12 Q. And you agree that the degenerative disc disease  
13 is what's causing his current back symptoms?

14 A. Yes.

15 Q. And getting back to the radicular symptoms, I  
16 want to be clear on this, from your review of the records,  
17 the radicular symptoms I think you said were resolved,  
18 correct?

19 A. Yes.

20 Q. So by the end --

21 A. I'm sorry, ask that again.

22 Q. I think your opinion number two was that he had  
23 radicular symptoms for a herniated disc that have since  
24 resolved?

25 A. No, I think that was the neck -- oh, I'm sorry,

1     you're right.

2     Q.           Okay. And in fact, from your review of the  
3     records, it appears that after Mr. Moss got injections,  
4     that he did not have radicular symptoms by the end of 2008,  
5     correct?

6     A.           Correct.

7     Q.           And you mentioned briefly a few other -- you  
8     mentioned briefly a few other conditions, a contusion,  
9     maybe some type of whiplash injury, those have all  
10    resolved, correct?

11    A.           Yes.

12    Q.           You were asked about post traumatic stress  
13    disorder, and I just want to be clear. You're not  
14    qualified, as an orthopaedic surgeon, to diagnose someone  
15    with post traumatic stress disorder?

16    A.           I think Mr. Haydu asked a similar question, and  
17    the answer really has to be yes or no. I mean, yes, we are  
18    because we're all trauma surgeons, so we see it and we are  
19    supposed to recognize it as part of the continuing  
20    education courses that we have. But then to really treat  
21    it, he's got to go to a psychologist or psychiatrist.

22    Q.           And there's no evidence in this case that he  
23    actually saw a psychologist or psychiatrist, is there, sir?

24    A.           I thought he did.

25    Q.           Well, he saw a counselor.

1 A. I'm sorry, yes.

2 Q. There's no record that a psychologist or  
3 psychiatrist ever treated this man for a --

4 A. No, I'm sorry, they're really treated by  
5 psychiatrist or psychologists or counselors.

6 Q. Or counselors?

7 A. Thank you.

8 Q. No indication that a doctor diagnosed him with  
9 post traumatic stress disorder, correct?

10 A. Correct.

11 Q. One of the things you focus on is diet and weight  
12 loss?

13 A. Oh, in my side -- in my hobby practice.

14 Q. Whatever we want to call it.

15 A. Yes.

16 Q. And fair to say there's an association between  
17 back pain and obesity?

18 A. There is.

19 Q. And you would agree that a 30 or 40-pound weight  
20 gain over two or three years would lead to increased back  
21 pain?

22 A. Could lead, yes.

23 Q. You would agree that that would be especially  
24 true with someone who has preexisting degenerative disc  
25 disease?

1 A. Sure. It's common sense, yes.

2 Q. And certainly can't rule out Mr. Moss' weight  
3 gain as having some effect on his back pain?

4 A. Correct.

5 Q. In fact, if you were giving advice to Mr. Moss,  
6 which you haven't done, what would you advise with respect  
7 to weight loss?

8 A. What would I advise as far as weight loss?

9 Q. And back pain.

10 A. I say everybody should lose weight in America,  
11 and yes, everybody with back pain should lose weight if  
12 they can.

13 Q. Now, you mentioned -- you mentioned the things --  
14 the restrictions on Mr. Moss. The restrictions you're  
15 testifying to aren't as a result of any physical exam of  
16 Mr. Moss, correct?

17 A. No, it's from reviewing the records and  
18 Dr. Hannallah's --

19 Q. Hannallah.

20 A. Hannallah, thank you.

21 Q. And you mentioned lifting heavy weights?

22 A. Yes.

23 Q. What is your understanding of what heavy weights  
24 he has to lift in his job as engineer?

25 A. As an engineer the main thing he has to do is

1     carry his grip which has been told to me is up to  
2     40 pounds.

3     Q.           In other words, he has some bags he has to place  
4     on the locomotives before he leaves?

5     A.           Yes.

6     Q.           And that would be the heaviest part of his job  
7     during the day, would you agree with that?

8     A.           Yes.

9     Q.           And he would do that essentially once a day when  
10    he gets on his locomotive?

11    A.           I think we mentioned on and off, or if they  
12    change trains they've got to do it.

13    Q.           Okay. Another thing you mentioned was  
14    vibrations?

15    A.           Yes.

16    Q.           And fair to say you're not an expert in  
17    measurement of whole body vibrations and its effect on the  
18    spine?

19    A.           Well, I don't know who is an expert on that, but  
20    I probably read more papers on vibrations on the spine than  
21    anyone else because of the railroad cases I've done. I've  
22    got them all here if you want to --

23    Q.           How many cases have you done regarding the whole  
24    body vibrations? I'm only aware of one.

25    A.           Oh, it's come up many times with the railroad and

1 the seats and the lack of the ergonomic seats and stuff.

2 Q. I'm asking about your experience, because I took  
3 your deposition last year, and you told me that was the  
4 only time you had dealt with whole body vibrations in the  
5 railroad.

6 A. I guess it's the word dealing with. It's  
7 probably the only case revolved around vibrations like  
8 that, yes.

9 Q. And in fact, you recognize that there are a body  
10 of standards out there that are used to measure whole body  
11 vibrations and its effect on the human spine?

12 A. Yes.

13 Q. And do those come from the International  
14 Standards Organizations?

15 A. Okay.

16 Q. Correct.

17 A. I really don't remember that, but if -- it  
18 would -- they're all accepted.

19 Q. What's that?

20 A. I'm sorry, I really don't remember that, but if  
21 you say so, I'll agree with --

22 Q. You don't know if the International Standards  
23 Organization has standards that measures the standards of  
24 whole body vibrations?

25 A. I'm sure they do; I don't remember exactly what

1 they are.

2 Q. Do you remember testifying that you were aware  
3 that there were those standards but you found them very  
4 confusing?

5 A. Yes. Thank you, yes, and they are -- they were.

6 Q. Do you remember testifying that the standards  
7 used to measure whole body vibrations and its effect on  
8 human health, quote, got all these fancy numbers, so I'm  
9 aware of them but I can't really comment on the quality of  
10 them?

11 A. Yes, that's true.

12 Q. And the papers you've seen, I did look at your  
13 list and I didn't look at them all, but certainly they're  
14 not all supporting your position that it is contraindicated  
15 for someone with degenerative disc disease to work as a  
16 locomotive engineer, correct?

17 A. I think my -- sure, obviously. Yes. The papers  
18 are always contradictory about everything.

19 Q. In fact, one of the papers you cited where it was  
20 the proceedings of the First American Conference on Human  
21 Vibrations through the National Institute of Occupational  
22 Safety and Health?

23 A. Yes.

24 Q. And if we look at what that document actually  
25 says, that document says evaluation of the data collected



1 in the studies reported here following ISO 2631 suggests  
2 that the shock and impact exposure for locomotive crew  
3 members presents a low probability for an adverse health  
4 outcome?

5 A. It does.

6 Q. And it also states that to put the locomotive  
7 vibrations exposure level in perspective, results were  
8 compared to the levels measured on heavy trucks, light and  
9 medium-duty trucks, a van and a motorcycle. The locomotive  
10 vibrations levels were also compared to levels reported for  
11 various vehicles found in the literature. The vibrations  
12 environment on locomotives was found to be comparable to  
13 commercial on-road vehicles and below commercial off-road  
14 vehicles and recreational vehicles, correct?

15 A. I see that, yes.

16 Q. And down below there it says the vibrations  
17 exposure experienced during locomotive operation was found  
18 to be consistently below the health guidance caution zones  
19 defined in the ISO whole body vibrations exposure standard.  
20 Do you see that?

21 A. It does, yes.

22 Q. This paper that you certainly relied on doesn't  
23 support an opinion that it would be dangerous or risk of  
24 injury for Mr. Moss to return to a locomotive environment,  
25 correct?

1 A. It doesn't, correct.

2 Q. And you agree, sir, that with his doctors, that  
3 he had reached maximum medical improvement by essentially  
4 the end of 2008?

5 A. Say that again.

6 Q. Do you agree with his doctors that by the end of  
7 2008 he had essentially reached maximum medical  
8 improvement?

9 A. Yes.

10 Q. And do you agree his radicular symptoms were gone  
11 by the end of 2008?

12 A. Yes.

13 Q. And you agree that he has had no active treatment  
14 for his back since 2009?

15 A. That's correct.

16 Q. And are you aware of the fact, sir, that Mr. Moss  
17 had episodes of back pain that would actually keep him out  
18 of work prior to this accident date? Were you aware of  
19 that forming your opinions?

20 A. He had mentioned that in his deposition, yes.

21 Q. And really the only thing he does is take  
22 occasional pain medication now, correct?

23 A. Yes. That's about all he can do.

24 Q. And pain medication, if someone has a  
25 prescription for back pain medicine, would that indicate to

1 you that they have some kind of back pain problem going on?

2 A. If they have a prescription -- well, sure.

3 Q. It's kind of an obvious question. If they have a  
4 prescription for back pain medication, would you agree with  
5 me that that indicates they've got some kind of issue with  
6 back pain?

7 A. Yes.

8 Q. Were you aware of the fact, sir, that Mr. Moss  
9 had a prescription for Flexeril for his back pain at least  
10 two years prior to this accident ever occurring?

11 A. Yes.

12 Q. And would it be fair to say if he had such a  
13 prescription, then he had issues with back pain prior to  
14 this accident?

15 A. Yes.

16 Q. And you agree, sir, that there's no indication --  
17 by the way, getting back to vibrations, you agree no other  
18 doctor has given an opinion like you did that vibrations  
19 would be a problem with Mr. Moss going back to work?

20 A. In this case?

21 Q. Correct.

22 A. Correct.

23 Q. The people who have actually seen him haven't  
24 said that?

25 A. Yeah --

1 MR. HAYDU: I'm going to object, Your Honor.

2 THE COURT: You're objecting to the question that  
3 people who have actually seen him haven't said that?

4 MR. HAYDU: Correct.

5 THE COURT: Well, I think he can answer that  
6 question.

7 MR. HAYDU: I don't believe it's been established  
8 that they were ever asked that question; therefore, it's  
9 unfair in its inception.

10 THE COURT: Well, that's something that I'll let  
11 the two of you sort out in your direct and cross of this  
12 witness.

13 MR. HAYDU: Thank you, Judge.

14 THE COURT: Thank you.

15 BY MR. CARNES:

16 Q. Let me ask it this way, nobody who's actually  
17 seen him has given a restriction that he has to avoid being  
18 in locomotives because of vibrations?

19 A. That's true.

20 Q. And you would generally agree -- again, this is a  
21 question I asked you before, you'd agree that someone who  
22 has degenerative disc disease is able to work?

23 A. Oh, sure.

24 Q. And the thing --

25 A. Well, depends on the individual and how bad the

1 degenerative disc disease is. Everybody's different.

2 Q. Right. And some people -- the thing that keeps  
3 him out basically is pain complaints, correct?

4 A. Yes.

5 Q. And pain is subjective?

6 A. Yes.

7 Q. And as far as, in your practice, Doctor, would  
8 you agree that it's better for a person with back problems  
9 to remain -- to remain active?

10 A. Yes.

11 Q. Activity's actually better for the back, would  
12 you agree with that?

13 A. Absolutely.

14 Q. And when you have patients who you treat for back  
15 problems, you advise them to stay as active as possible,  
16 don't you, sir?

17 A. Yes, I do.

18 Q. And as far as you know, there's no reason, as we  
19 sit here today, there's no indication that Mr. Moss will  
20 need future surgery, do you agree with that, sir?

21 A. As of right now, no. Is it possible -- I'm  
22 sorry. No.

23 Q. No, meaning there's no indication he's a  
24 candidate for surgery at this point?

25 A. Right.

1 MR. CARNES: That's all I have. Thanks, Doctor.

2 THE COURT: Redirect?

3 MR. HAYDU: Thanks, Judge.

4 REDIRECT EXAMINATION

5 BY MR. HAYDU:

6 Q. Counsel showed you one vibrations study and put  
7 it up regarding locomotive vibrations. Are there other  
8 vibrations studies that indicate that it is dangerous to  
9 individuals, especially that have had prior back injuries,  
10 that would lead you to believe that individuals with prior  
11 back injuries should not be working in the locomotive  
12 environment?

13 A. There were.

14 Q. Do you have those with you?

15 A. Yeah. Do you want them?

16 Q. If you want to grab one I can throw it up on the  
17 Elmo.

18 A. No, they're all in a pile.

19 Q. Okay. You were asked about whether or not  
20 Mr. Moss still had radicular pain. Looking at his treating  
21 physician, Dr. Hannallah's January 28th, 2009 report, page  
22 15 of Exhibit Number 1, does it not indicate that on  
23 occasion he does have pain in his legs and his buttocks,  
24 but really most of the pain is in his back?

25 A. Correct.

1 Q. So does that indicate whether or not he's still  
2 experiencing radicular pain?

3 A. It implies that it does, yes, I'm sorry, it says  
4 that he does, yes.

5 Q. Now, looking at your chronology, the pre-accident  
6 history, if you go to page four of your report --

7 A. Got it.

8 Q. -- you said you were unaware if there was any  
9 radicular symptoms. Do you have a note from a 5-20-02  
10 visit at Grand Medical Center?

11 A. I do.

12 Q. And what is the symptoms?

13 A. It says pain and tingling sensation across the  
14 low back and tingling down the left leg to left shoulder,  
15 lifting heavy objects.

16 Q. Now, why, in your opinion, does -- strike that.

17 At the time of this accident after 35 years on  
18 the railroad, did you ever see -- in your review of the  
19 records after 35 years on the railroad, did you see that  
20 Mr. Moss was ever disabled from working because of any back  
21 problems until this accident?

22 A. Correct, he was not.

23 Q. Was he working full duty at the time of this  
24 accident?

25 A. He was working full duty, yes.

1 Q. Did you see any indication that the railroad had  
2 ever pulled him out of service because of any concerns that  
3 he had a bad back prior to this accident?

4 A. He did not.

5 Q. Now, you were asked some questions regarding the  
6 psychological counseling, Mr. Bastin -- Dr. Bastin -- can a  
7 counselor provide valid treatment just as well as any  
8 psychologist?

9 A. They can, and they do. And they do the majority  
10 of it.

11 Q. Now, does the fact that Mr. Moss had I think  
12 three episodes or two episodes in the last 30 years of  
13 radicular pain or symptoms for a short period of time, I  
14 think Dr. Brandt used the term self limiting, what does  
15 that indicate to you, what was going on in his back before  
16 the accident?

17 A. Well, obviously something was irritating the  
18 sciatic nerve, and it could be a bulging disc coming out,  
19 and then with a short period of rest it goes back in, and  
20 that's the -- that's the natural course of the problem.

21 Q. Is that something that a fully extruded herniated  
22 disc that shot out of the annular margin would cause for  
23 over those period of years?

24 A. No. I mean, absolutely not.

25 Q. So we're -- are we in agreement that Mr. Moss had



1 degenerative changes in his lumbar spine that caused  
2 symptoms of back pain and I think two episodes of leg pain  
3 in the last 20 years before the accident?

4 A. Well, yes, sure.

5 Q. Okay. Does that change your opinions at all?

6 A. No.

7 Q. Now, do you agree with Dr. Hannallah's  
8 restrictions that he shouldn't lift more than 20 pounds, he  
9 should avoid twisting, he should avoid bending?

10 A. I do. I agree with him.

11 Q. Now, does the fact that Mr. Moss had two episodes  
12 of pain in his leg prior to this accident indicate that he  
13 ever had a herniated disc before the accident, or is that  
14 just a possibility among other causes?

15 A. I'm sorry, say that again.

16 Q. Before the accident of April of 2008, there were  
17 I think two instances brought up where he had radiating  
18 pain in his right leg. Does that indicate he had a  
19 herniated disc, or is that just one of the possibilities?

20 A. Oh, thank you. Thank you. Yes, it's one of the  
21 possibilities.

22 Q. What else could cause the pain going down his  
23 leg?

24 A. Anything irritating the nerve that goes all the  
25 way down to the leg, and that could be a muscle strain,

1 that could be an inflammation, that could be arthritis, a  
2 blow.

3 Q. Could that be a muscle strain from lifting heavy  
4 boxes, cleaning out your garage?

5 A. Well, sure. Absolutely. And the fact that it  
6 goes away so fast generally indicates it's really not a  
7 disc. And he never even had an MRI.

8 Q. So that was going to be my next question. How  
9 does the fact that the episode of pain or discomfort in the  
10 right leg goes away so quickly, what does that indicate to  
11 you as an orthopaedic surgeon?

12 A. That it's definitely not an extruded disc, and  
13 it's most likely not a herniated disc.

14 Q. Now, you talked about testifying. You were asked  
15 questions that you testify frequently for my firm. You're  
16 hired by other firms to review cases?

17 A. I am.

18 Q. Okay. Now, and you -- you indicated that in the  
19 cases that you testify, you are of the opinion that -- that  
20 there is some type of injury, or that the injury was caused  
21 or worsened by the event at the railroad, do you remember  
22 those questions?

23 A. Yes.

24 Q. Okay. What do you do when you're first contacted  
25 about a case, Doctor? Do you look at the materials?

1 A. Well, sure.

2 Q. Okay.

3 A. Well, first I look at who the lawyer and law firm  
4 are. A lot I just don't like, so I don't look at them.  
5 And then I look at the records --

6 Q. If it's someone like me, you're going to, you  
7 know, work with them, do you look at the records?

8 A. I do.

9 Q. And do you give an opinion as to whether or not  
10 there's a case there or not?

11 A. Yes.

12 Q. If you give them the opinion that there's no  
13 case, railroad didn't do anything wrong, there's no injury,  
14 do you ever get followed up with on the case, or is it  
15 dropped?

16 A. Well, I drop it. And as I said at the last  
17 deposition, if the attorney starts to argue with me about  
18 should be, I'll say, I can't work with you anymore. And  
19 that's what I like about Hoey & Farina, they don't argue.

20 Q. So if you tell us there's no case, it's dropped?

21 A. It's dropped.

22 MR. HAYDU: No further questions.

23 THE COURT: Recross?

24 MR. CARNES: Just briefly.

25 RE CROSS EXAMINATION

1 BY MR. CARNES:

2 Q. Earlier we talked about the fact that when you  
3 initially wrote your report and gave your deposition  
4 testimony, the reason you believed that he had a herniated  
5 disc caused by the accident was because of the lack of  
6 radicular symptoms prior to April of 2008, correct?

7 A. Yes. That was the main -- that was a significant  
8 reason.

9 Q. And Mr. Haydu just said, well, you did see a  
10 record in 2002 of radicular pain, but that was left-sided  
11 radicular pain, right?

12 A. Correct.

13 Q. So left-sided radicular pain wouldn't have  
14 anything to do with what we're talking about here?

15 A. Not usually. It's possible, but not usually.

16 Q. What you would be looking for to determine if he  
17 had a herniated disc prior to April of 2008 would be  
18 right-sided radicular pain?

19 A. That doesn't go away. When they have some  
20 documentation with an MRI, yes.

21 Q. Is his extruded disc gone away now, has his  
22 extruded disc gone away now? Does he still have a  
23 herniated disc?

24 A. If -- the only way to really know that is if you  
25 get another MRI. But if the symptoms are gone, it means

1 that that disc, which we now know it has absorbed, that's  
2 what the body does, gradually over time it can absorb as  
3 well as those injections that we talked about.

4 Q. You testified that it's been almost three years  
5 that he's had radicular symptoms?

6 A. Yes.

7 Q. Since they've gone away, is it your opinion then  
8 that he no longer has a herniated disc?

9 A. Well, you'd have to say that, yeah, the disc  
10 itself that extruded then has got to be smaller. I mean,  
11 it's just common sense, it's not pressing against the nerve  
12 anymore. But to really answer your question honestly,  
13 you've got to get another MRI. But no one's going to do  
14 that without symptoms.

15 Q. And in order to rule in or out a herniated disc  
16 was causing his symptoms prior to 2008, we need to see an  
17 MRI as well, right, is that your testimony?

18 A. Yes and no. Before we get those fancy expensive  
19 tests, you do the clinical, and he didn't have -- the pain  
20 went away so fast. So that's why I think it was not that.

21 Q. And it went away here after a couple months,  
22 correct?

23 A. Well, he had the injections.

24 Q. Right. But he's no longer having symptoms,  
25 radicular symptoms?

1 A. Well, correct. Although Dr. Hannallah in his  
2 last note mentioned that he still had some, and I think he  
3 mentioned in his deposition he still had some  
4 intermittently.

5 Q. I took your deposition two weeks ago. Your  
6 testimony was it's been almost three years without having  
7 radicular symptoms. Do you recall that?

8 A. Yes.

9 MR. CARNES: Nothing further. Thanks.

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C E R T I F I C A T E

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

s:/Angela D. Nixon

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Angela D. Nixon, RPR, CRR

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